IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,237

Fourth District Case Nos.

82-1332 82-1992
82-1341 82-1993
82-1597 82-2070
82-1686 82-2078

FLORIDA PATIENT'S COMPENSATION FUND, and FLORIDA MEDICAL CENTER, INC., d/b/a Florida Medical Center,

Appellants,

vs.

SUSAN ANN VON STETINA, by and through her parents, legal guardians and next friends, MARY VON STETINA and LEO VON STETINA,

Appellees.

ON APPEAL OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

APPELLANTS' INITIAL BRIEF

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EXPLANATION OF REFERENCES

The following references will be used throughout this brief:

T.____ refers to pages in the trial transcript.

A.____ refers to pages in Volumes I and II of the Consolidated Appendix filed with Appellants' brief in the Fourth District Court of Appeal, and Volume III furnished with this brief. Copies of Volumes I and II of the Consolidated Appendix are being filed with the Clerk of this Court for convenient reference.

AFP____ refers to the transcript of the first hearing hearing on Plaintiff's attorney's fees.

AFD ____ refers to the transcript of the hearing where Defendant presented evidence of Plaintiff's attorney's fees.

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STATEMENT OF THE CASE AND THE ISSUES

This case submits for review the largest medical malpractice judgment in Florida history, the largest attorney's fee award in such a case and several significant constitutional questions. The Fourth District affirmed the judgments declaring sections of the Florida Medical Malpractice Act unconstitutional (A. 624) and this Court has jurisdiction over all the issues in the case.* The issues before this Court are as follows:

(1) ARE APPELLANTS ENTITLED TO A NEW TRIAL?

(2) IS THE STATUTORY LIMITATION ON THE DIRECT LIABILITY OF HEALTH CARE PROVIDERS WHO JOIN THE FLORIDA PATIENT'S COMPENSATION FUND CONSTITUTIONAL?

(3) IS THE STATUTE WHICH DIRECTS THAT DAMAGES FOR FUTURE MEDICAL EXPENSES BE PAID AS THEY ARE INCURRED APPLICABLE AND CONSTITUTIONAL?

(4) DOES THE AWARD OF ATTORNEY'S FEES--ORIGINALLY $4.4 MILLION, REDUCED TO $1.5 MILLION--COMPLY WITH THE PROPER STANDARD FOR AWARD OF RESPONSIBLE ATTORNEYS FEES?

(5) IS THE STATUTE PROVIDING FOR ATTORNEY'S FEES CONSTITUTIONAL AS APPLIED IN THIS CASE?

STATEMENT OF THE FACTS

On November 26, 1980, Susan Von Stetina was involved in a serious automobile accident and was taken to the emergency Room at Florida Medical Center. On December 1, she underwent trauma-induced respiratory distress, and was placed on a respirator (T. 530-33, 1626). At 3:28 a.m. on the morning of

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* The appellants have also filed papers seeking discretionary review of the acknowledged direct conflict in decisions (case number 64,252) and to review the decision upholding the constitutionality of the attorneys fee statute, (case number 64,251). At the time this brief was completed, the Court had not made any determination on these issues and they are therefore briefed in this case.

December 3, Susan was found to have a very low heartbeat, as if no oxygen was being provided to her lungs. A team of physicians and nurses, acting in response to an emergency "Code Blue," saved Susan Von Stetina's life through cardiopulmonary resuscitation, but she suffered extremely serious brain damage from the episode.

She will never talk, read or make a voluntary movement again. As Plaintiff's counsel said in his opening statement, "she is going to be that way for the rest of her life. There is nothing known to man or science that will in any way restore any function as far as this young lady is concerned." (T. 462.) Plaintiff's expert witness, Dr. Michael Rie, testified that the brain damage was irreversible:

> A large number of cells in the brain die. If we were to weigh Susan Von Stetina's brain today it would weigh probably a half to two-thirds of what other twenty-seven-year-old women's brains would weigh. It's just dead.
>
> (T. 911).

She will require full nursing care for the rest of her life -- to be fed, turned, suctioned and comforted. (T. 1466). There was some evidence that Susan Von Stetina was aware of the presence of others in the room, and her face grimaced in response to the movement of her limbs by a physical therapist. There was nothing to contradict Dr. Rie's testimony, however, that Susan Von Stetina lacked any capacity for awareness of the tragedy that has befallen her.

Plaintiff's theory of the case was that this lamentable situation was caused by the negligence of Florida Medical Center ("Hospital") in failing to constantly monitor her respirator. Several expert witnesses testified that the Hospital was negligent in relying on the alarms of the machine instead of having constant one-on-one monitoring by a nurse. Although the Defendant presented expert evidence that the one nurse to two patient ratio actually

employed was acceptable, the jury concluded that the cause of the Susan's present condition was the negligence of the Hospital.

The Florida Patient's Compensation Fund ("Fund") concedes that there was sufficient evidence of negligence for the jury to decide as it did and, even though the error in admitting a particular exhibit* may have influenced the liability decision, the Fund does not now contest liability** in this case and has offered the plaintiff the benefit of Fund support for medical and nursing care pursuant to the statute. (A.643).

Appellants argue, however, that the verdict, totalling $12.4 million, was excessive. A special verdict form was used, and the components of the award were as follows:

1.	Past Medical and Nursing Care	$ 125,000
2.	Future Medical and Nursing Care	7,536,000
3.	Past Loss of Earnings	16,250
4.	Future Loss of Earnings	663,000
5.	Past Pain and Suffering	133,000
6.	Future Pain and Suffering	4,000,000
	Total	$12,473,250

The Fund and the Hospital maintain that, even if liability were completely conceded, a 12.47 million dollar judgment is not proper. The courts below erred, however, in entering and approving a lump sum figure

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* Even the Fourth District concluded that Exhibit 24 was erroneously admitted, and this brief will demonstrate that this was not only error but reversible error.

** This concession by the Fund is made for a number of practical considerations and it implies no concession by the hospital nor any insinuation by the Fund about the hospital's conduct. Indeed, the Hospital continues here to contest the validity of the jury's determination of liability.

for future medical and nursing care and lost earnings (items 2 and 4) and in allowing the pain and suffering awards (items 5 and 6).

Appellants also challenge two constitutional rulings of the trial court, which were adopted by the Fourth District. The trial court invalidated two subsections of the statute governing the Fund's operation, Sections 768.54(2)(b) and 768.54(3)(e)3. (1981). The former, subsection (2)(b), limits the liability of Fund members for claims covered by the Fund to $100,000 and contemplates that the rest of the liability will be borne by the Florida Patient's Compensation Fund. Despite this clear statutory scheme, however, the trial court held that both the Fund and Hospital should be jointly and severally liable for the full $12.4 million (plus attorneys fees). Florida Medical Center was thus denied the medical malpractice protection it was promised by the Florida Statutes when it joined the Fund, after the time for purchasing other protection had passed.

The trial court also held that the appellants had to pay the entire award in a lump sum, contrary to a provision of the Fund statute which requires payment of certain elements of damages in installments. All these issues -- validity of the verdict, limitation of liability, and payout of damages -- were preserved by timely notices of appeal to the Fourth District Court of Appeal.

Opinion of the Fourth District Court of Appeal

Appellants' primary point for reversal of the basic liability and damages judgment was that the trial court erred in admitting Plaintiff's Exhibit 24* which was, in the words of the Fourth District opinion, "an

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* The full text of this article is reprinted in argument I.A. below, at 13-14.

imaginary account written in the first person about a helpless patient's state of mind when a respirator malfunctioned." The Fourth District agreed that admitting it was erroneous, that the article was "fiction", an "emotional account", and "most moving", but still found its admission to be harmless error. Opinion at 17-19.

The Fourth District concluded that the 7.5 million dollar award for future care was supportable because it was just "simple arithmetic" -- 40 years of life expectancy times $188,400 a year* -- and that the 4.1 million dollar pain and suffering verdict given to a semi-comatose patient, while "admittedly at the maximum of any reasonable range", Opinion at 3, was reasonable since the Court concluded, as a fact, that she "possesses all the senses in varying degree . . . has some understanding, and must endure incessant pain and suffering." Opinion at 3-4. (Emphasis added to the portion of the quotation which is contrary to record).

Having approved the liability and damage verdict, the District Court then faced the two-step issue of the applicability of the payout provisions of the Fund's statute. The court first needed to decide whether the 1982 version of the Fund statute (which provided future medical expenses would be paid as they were needed) applied rather than the 1976 payout version, which had limited the Fund's annual payments to $100,000 a year on any given claim. Although the case was on appeal and no damages had yet been paid the Fourth District concluded, without explanation, that applying the 1982 version would be impermissibly "retroactive."

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* This "simple arithmetic" is admittedly much easier since there is no calculation for reduction to present worth. The Fourth District opinion leaves intact the verdict based on the plaintiff's trial counsel's "cancellation economics" theory.

The trial court, after finding the $100,000 payout limit of the 1976 statute to be applicable, had held it unconstitutional as (1) an encroachment on the inherent power of the courts; (2) unconstitutional "when applied to the facts in this case" since $100,000 a year was less than the jury awarded for medical care; and (3) an invidious discrimination against malpractice victims who suffer more serious damage. The Fourth District quoted the trial court's argument, Opinion at 4-7, adopted it, but then added the apologetic caveat:

> Our use of this language on these constitutional findings should not be interpreted to suppose that we embrace each and every word thereof. However, time appears to be of the essence and to craft our own versions of the unconstitutionality would incur considerable delay. (Opinion at 11-12.)

The Fourth District treated the issue of the nature of protection given a Fund member in a comparable manner. Essentially, the Fourth District -- like the trial court -- recognized that the Fund statute, in particular §768.54(2)(b), exempts a Fund member from payment of more than $100,000* on any covered claim. The Fourth District held this provision, known as the "limitation of liability" provision, unconstitutional as an "encroachment upon the powers granted exclusively to the judicial branch of the government." The Fourth District silently refused to adopt the view, relied on by the plaintiffs and the trial court, that the "limitation of liability" provision denied plaintiffs "access to courts."

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* The actual statute states, $100,000 or the Fund member's primary coverage, whichever is greater. Since Florida Medical Center's primary coverage is $100,000, the $100,000 figure is the relevant one and will be used throughout this brief.

Facts Relating to the Attorney's Fee Award

Mr. Schlesinger, the attorney for the Von Stetinas, testified that Susan Von Stetina's parents and legal guardians first came to his office in March of 1981 (A. 589). In April, 1981 Mr. Schlesinger and his client entered a contingency fee contract--he would receive 40% of any recovery, or 50% if there were an appeal (A. 589-90). The complaint was filed on April 2, 1981. Mr. Schlesinger discussed with his clients the law which allowed the prevailing party to recover attorney's fees (A. 589-90). Presumably, therefore, it was clear to both attorney and client that Mr. Schlesinger would be seeking payment from the defendants.

Although he intended to look to the defendants for payment of legal fees if the plaintiff prevailed, Mr. Schlesinger did not keep time records. His appointment diary, however, was one measure of his efforts.* The

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* The first appointment for the Von Stetina case was a hearing on motion to strike punitive damages on April 27 (A. 532). Before that, Schlesinger did not remember spending any time on the case, and he conducted a one-week products liability trial after the Von Stetina complaint was filed (A. 531). The week of May 18, 1981, Schlesinger prosecuted another four-day trial unconnected to the Von Stetina matter (A. 533-34). On June 15 there were discovery motions on Von Stetina (A. 535-36). The week of July 13, Schlesinger had another three or four-day trial unrelated to Von Stetina (A. 538). A Von Stetina motion was heard on July 15 (A. 538).

From August 3 to September 11, Schlesinger conducted a six-week products liability trial against Toyota Motor Co. Not surprisingly, this case took up all his time at least for those six weeks (A. 540). Through September and October, Schlesinger worked on four other cases; three settled, and one at least began trial (A. 543-44). Throughout all this time, Schlesinger did not remember working on the Von Stetina case, or that his office had "any investigation ongoing" (A. 545).

On November 2, Schlesinger's diary reflects a conference with Mrs. Von Stetina (A. 545-46). Depositions on the Von Stetina matter began in mid-November (A. 546-47), although the process speeded up in February (A. 558-65). Schlesinger worked on some twenty other matters from mid-November to the time of the Von Stetina trial, which ran from March 15 to 26, 1982 (A. 547-66). Most of these matters settled, but one was thoroughly prepared (A. 554), and another malpractice case went to trial for two days in February (A. 559).

appointment diary reflects that Schlesinger spent minimal time on the Von Stetina case before November 1981, and for the five-month period beginning in November worked on many matters in addition to Von Stetina. This is consistent with statements at the pretrial conference that Schlesinger began work on this case in earnest in November 1981 (A. 274, 283).

A second objective measure of the effort spent on the case is the measure of defense effort which, unlike the plaintiff's work, was recorded. Kevin O'Brien, who defended the case throughout, testified that he spent 845 hours on this case. (A. 593-94). O'Brien was present at every deposition, hearing, or motion where Schlesinger was present (AFD. 12-14).

Mr. Schlesinger presented two witnesses to support his application for a fee -- J.B. Spence and Robert Montgomery -- both noted plaintiff's personal injury attorneys with experience in medical malpractice cases. Neither claimed any special familiarity with the Von Stetina case but both testified that the proper fee was 40% of the 12.4 million dollar judgment.

Mr. Schlesinger also testified on his own behalf. From his admission to the bar in 1954 (A. 584), he has been a plaintiff's personal injury lawyer (A. 585). He has tried many medical malpractice cases, but does not specialize in them (A. 585-86). Mr. Schlesinger testified that he was "entitled to a fee of at least $5,000,000, or $5,500,000, or $6,000,000, none of which I feel would be unreasonable" (A. 588). The "most important" justification for fees of this magnitude, to Schlesinger, was that they met with his clients' approval (A. 588).*

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* It was, however, not suprising that the clients (by which Schlesinger presumably meant Susan's parents) were so complaisant, since they would not be paying the fee.

Defendants presented two expert witnesses who testified on the "reasonable attorney's fee" issue. William Thompson, an experienced medical malpractice plaintiff's attorney, testified that a fee of $300,000 would be reasonable (AFD. 30). This involved a fee of $250/hour for 1000 hours and a $5000/day bonus for trial work.* John Neely, a medical malpractice defense lawyer, testified for a fee averaging $500 an hour, or $500,000 for a generously estimated 1000 hours (AFD. 48).

Although the trial court organized its opinion in terms of the factors of DR 2-106(B), the court awarded a percentage of recovery fee "in line with the type of fee arrangement made between counsel and his client" (A. 36). Thus, the judge in effect ordered a fee of 35% of the verdict, or $4.4 million. The trial court's award of 35% of the jury verdict amounted to $88,000 a week for each of the 50 weeks from the time the complaint was filed until verdict and it appears from Schlesinger's own deposition that only token effort occurred before the last 19 weeks of the year. A more accurate calculation would determine the fee as $231,000 a week. If it is generously assumed Schlesinger spent 1000 hours in the case, the attorney's fee awarded by the trial court comes to $4400 an hour. It is this attorney's fee which was appealed as unreasonable under §768.56. The Fourth District reversed, correctly recognizing that the contingency fee factor was "uppermost in [the trial court's] mind." However, the Court found a fee of $1.5 million to be appropriate. No objective rationale for this figure was given. The Fourth District reduction of the award still leaves it at the level of more than $1500 an hour.

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* The assumption that the plaintiff's attorney worked 155 more hours than defense counsel has no real basis in the facts and is favorable to plaintiff. Under William Thompson's calculations, the plaintiff is given an additional $50,000 over the hourly rate calculation--$25,000 per week of trial.

The Fund's Origin and Operation

In order for this Court to be aware of the reason the Fund is in this case, and to place the case in perspective, we include a brief discussion of the nature of the Florida Patient's Compensation Fund. The concept of the Fund was upheld by this Court against constitutional attack in Department of Insurance, State of Florida v. Southeast Volusia Hospital District, ___ So.2d ____, 8 Fla.L.Wk. S.Ct.354 (Fla., Sept. 15, 1983). In that case, this Court described the Fund as follows:

> The Fund, which commenced operation in 1975, is a non-profit entity which provides medical malpractice protection to the physcians and hospitals who join it. . . . The Fund is financed through base fees paid by its members, additional fees, and assessments. . . . The provisions of the statute plainly satisfy the purpose of the statute, namely, to provide medical malpractice protection for Florida health care providers under terms accepted by the participants.

The essential terms accepted by the participants were, as this Court recognized in Southeast Volusia, set out in the statute, §768.54.

(1) Members receive from the Fund:

  (a) Statutory limitation of liability,

  (b) Fund obligation to pay all judgments or settlements over $100,000,

  (c) Possibility of refund if fees are excessive.

(2) Members give to the Fund:

  (a) Fees set at time of joining a particular Fund year.

  (b) Promise to pay future assessments if fees are insufficient.

The purpose of the Fund is two-fold: (1) providing a substitute means of payment to medical malpractice plaintiffs (as many Florida health

care providers are not required by law to be financially responsible) and (2) providing medical malpractice protection to Florida health care providers. These are plainly valid substantive purposes. See Southeast Volusia; Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977); and Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981). Since the Fund is non-profit, it will have a larger portion of its fees available to pay claims than a private insurance company.

Plaintiff might wish the Fund were an insurance company rather than a limitation of liability device,* but this was not what the Legislature created. Moreover, the terms of the contract cannot be reformed now, after Florida Medical Center has joined the Fund, relying on the actual contract provided by the Florida statutes in effect at the time of its joinder, and after it has foregone all opportunities for other protection. The parties therefore deal with the actual terms of the Fund statute, and not what plaintiff would like them to be, or the statute one's ideal legislature would have written.

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* Other than the limitation of liability, there are various other differences between the Fund and insurance companies. First, the Fund is run by a publicly-appointed board and decisions which would be business decisions in the case of an insurance company (for instance, the order of payment of claims) are subject to pervasive statutory regulation in the case of the Fund. Moreover, the Fund has no underwriting authority, but must take all Florida health care providers who elect to join and can not accept any members other than Florida health care providers. Third, the Fund operates so that each year is kept separate from all others and money from one year cannot be used to pay claims attributable to a different Fund year. Fourth, members join for a particular Fund year and are liable for assessments should member claims exceed fees originally paid. Finally, for the relevant years, the Fund had no authority to set "policy limits." Its exposure, and consequently, the protection accorded under the Fund concept to Florida health care providers members, was limitless.

ARGUMENT

I.

APPELLANTS ARE ENTITLED TO A NEW TRIAL ON DAMAGES.*

A. The Admission of Plaintiff's Exhibit 24 was Reversible Error.

Appellants argued to the Fourth District that Exhibit 24, "an imaginary account written in the first person about a helpless patient's state of mind when a respirator malfunctions," Opinion at 17-18, was erroneously admitted. The Fourth District agreed with appellants that admission of the Exhibit was error:

> This particular work of fiction was not presented by its author and there was no predicate whatsoever that the plaintiff, or any other patient for that matter, had actually endured such thoughts and emotions under this or similar circumstances. Courts are supposed to deal in facts not fiction and we, therefore, believe error occurred.
>
> Opinion at 18.

The Fourth District's candid opinion reveals that the panel agonized over the impact of this exhibit. They "deliberated long and hard on whether

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* The Hospital additionally urges the following argument concerning Plaintiff's Exhibit 24, and incorporates those parallel arguments it adopted below before the Fourth District, see appellant Fund's Initial Brief Number I, Section IV.A. (1) through (3), as grounds for reversal of this case on all issues, including that of liability. Although cast here as error prejudicing appellants by improper inflation of the verdict, the erroneous admission of Exhibit 24 could, and did, equally prejudice the Hosptial's right to a fair determination of the question of its liability. Accordingly, the Hospital respectfully requests that this Court additionally consider this evidentiary issue as grounds for a complete reversal of the judgement.

this error was reversible," Opinion at 18, but, after their deliberations, still held this error not reversible since it "did not materially affect the outcome." Opinion at 19. The Fourth District was correct to find error but wrong to find the error harmless.

The Court correctly recognized that the article was, on its face and on the cold record, emotional and deeply moving. This is the text of Exhibit 24:

> "Yeech, I'm choking. Oh, Christ, I'm dying.
>
> "Not enough air. Walls vibrating. Closing in. Taking up all the air,
>
> "No air.
>
> "Suffocating.
>
> "Please help. Help me. I screamed, but there was only silence.
>
> "Can't talk. Something in my throat. No air.
>
> "Help.
>
> "Oh, God. Oh, God, please help.
>
> "Whoosh. Swoosh. Shoosh, Swoosh. Endless.
>
> "Someone's soft hand rubbing my arm in rhythm to the sound. It's easier now. The air is filling my lungs. It is no longer necessary to struggle for each breath.
>
> "What if it stopped? Oh, God, what if it stopped?
>
> "A lot of people are standing around my bed. Swaying back and forth in a pool of light. Buzz. Buzz.
>
> "It is dark. Everything is quiet, except for the comforting, whooshing and swooshing of my machine. I am still alive. My body hurts. My chest is sore and aching. My arms are burning. Nurses are gliding about the room from bed to bed, whispering. I adjust my eyes to the darkness.

"What time is it? What day is it? How long have I been here? Did I sleep? It is so dark it must be night, but which night? There are no words for that kind of terror. Nobody could know. Nobody. I wish I could tell them. It would be so much easier if I could just tell them. If they could just understand, but they can't and I haven't the words to tell them.

"Suddenly I hear a sound. Just a tiny squeak. It's coming from the machine. With every breath I take, a squeak.

"Oh, help. What is wrong? If the machine is broken I'll die. I don't want to die. I'm not ready. I have too many things to say. I'm not finished yet. My eyes frantically search the room. I try to lift my hands but they are tied. Help. Help. Not a sound. I can't talk. The tube.

"Something is wrong. What is that noise? Don't you hear it? You're supposed to hear it. Please come and fix it. Frantically I bang the rails of my bed. Tap, tap. I see the nurse across the room stop and listen.

"I'll be there in a minute.

"A minute. I haven't got a minute. You have to come now. Can't you hear the noise? Don't you know my life depends on that machine?

"What's the matter? Can't you hear what's the matter? My eyes shift from the machine to her and back. My lips form the word machine. She doesn't understand. She can't read lips or eyes.

"She doesn't understand it. I will try again. She is trying.

"What day is it?

(A.94)(Emphasis added).

This article, a fictional account, was written by someone who was never shown to have had such personal experiences and whose other qualifications were not before the court. It is as if the jury were presented with the movie The Verdict or read passages from the novel Hospital. This work goes beyond hearsay to fiction, deliberately designed to be sensational.

Essentially, the Fourth District recognized that the plaintiff's counsel had led the trial court into error by presenting a fictional account as fact, acknowledged that the account had the strong effect intended by counsel, but nonetheless affirmed because of its speculation the jury would have reached the same result anyway. This is improper.

An appellate court does not guess whether the result would have been the same in deciding whether error is harmless. The standard is a much more objective one. Harmful error results when immaterial evidence "is pursued to the point that it is calculated to unduly excite the passions and prejudices of the jurors," Alexander v. Alterman Transport Lines, 387 So.2d 422, 423, (Fla. 1st DCA 1980), quoting LeFevre v. Bear, 113 So.2d 390, 392 (Fla. 2d DCA 1959)(emphasis added). As the First District stated the test: "material errors which reasonably could have caused injustice are reversible errors." Reeder v. Edward M. Chadbourne, 338 So.2d 271 (Fla. 1st DCA 1976). This Court applied the correct standard in McArthur v. Cook, 99 So.2d 565 (Fla. 1957), saying, had the erroneously excluded evidence been admitted, the ultimate result of this case "could have been entirely different. We do not say that it would or should have been different; we merely hold that if the correct rule of evidence had been applied, it could have been." Id. at 568. (Emphasis added). Accord: Stanley v. United States Fidelity & Guaranty Co., 425 So.2d 608 (Fla. 1st DCA 1982) (although it is impossible to know effect of evidence for sure, "risk" of reversal "placed on party who sought the benefit of improper evidence"). See also Marley v. Saunders, 249 So.2d 30, 39 (Fla. 1971)(retrial needed when instructions "reasonably calculated to mislead"). (Emphasis added).

In this case, the Fourth District all but explicitly recognized that Exhibit 24 was "calculated to unduly excite the passions and prejudices of the

jurors." In their brief below, appellees argued that Exhibit 24 was very "importan[t] to their case," and noted that "it is difficult to conceive of a more forceful piece of evidence." Brief at 39. We agree, and think that such "forceful", "important", dramatic, emotional, and moving items of evidence, if erroneously admitted, will be reversible error.*

In similar cases involving dramatic and improper pieces of evidence, reversible error is either presumed, or in any case, is readily found. See Bullock v. Branch, 130 So.2d 74 (Fla. 1st DCA 1961)(prejudice presumed from "inflammatory" Golden Rule argument, so reversible error found although it was impossible to show actual prejudice); Seshadri v. Morales, 412 So.2d 39 (Fla. 3d DCA 1982)(comments about "value of an innocent baby" and "value of human life" in baby wrongful death action held reversible error).

In this case, Exhibit 24 was "directed to a critical issue at the trial" as in Mall Motel Corp. v. Wayside Restaurants, 377 So.2d 41 (Fla. 3d DCA 1979). The dependence of a respirator patient had already been established, but Exhibit 24 portrayed respirator patients as panic-stricken and terrorized as well.** This grisly portrayal would make the jury much more likely to give a huge amount of damages. No one can say there is not a substantial chance that the verdict, which now must be borne by all health

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* Because the evidence was dramatic, cases which find evidence cumulative and therefore, if erroneously admitted, harmless, are distinguishable. E.g. Sea Crest v. Burley, 38 So.2d 434 (Fla. 1949). Exhibit 24 was not colorless and dry factual testimony.

** There is no evidence that Susan Von Stetina had such feelings and indeed, there is reason to doubt that she had any conscious thought before the respirator accident since she was heavily sedated. Sadly, after the respirator accident, she was brain dead.

care providers, and ultimately Florida health care consumers, was not higher than it would have been without Exhibit 24.

The Fourth District's opinion also conflicts with the holding of the First District in Stanley v. United States Fidelity & Guaranty Co., 425 So.2d 608 (Fla. 1st DCA 1982) .* The First District in Stanley, on very similar facts, held that since the counsel in Stanley referred to the evidence in his closing argument, the Court would presume the evidence was sufficiently potent to be prejudicial.

In this case, this reasoning is even more strongly applicable. Plaintiff's counsel did more than refer to Exhibit 24 in his summation. Mr. Schlesinger felt Exhibit 24 was so important he read the entire document in his closing argument. Since the erroneously admitted article was the centerpiece of plaintiff's closing argument in this case, it plainly was reversible error to admit it.

Its effect was particularly obvious in light of the multi-million dollar pain and suffering award, which was, as the Fourth District admitted, at "the maximum of any reasonable range." The jury also awarded the highest "ideal medical care" that the evidence authorized, and the precise figures for lost earnings sought by plaintiff's counsel in his closing arguments. In these circumstances there is a fair inference that the erroneous admission of Exhibit 24 affected the jury's verdict. If the Court agrees with Appellants, reversal is required** and vacation of the Fourth District opinion proper.

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* The Stanley case is before this Court, as we understand, for resolution of the certified question of whether the admission of the evidence was itself erroneous.

** The Hospital, again, contends that the Court should reverse on liability as well as damages.

B. The Damages Awarded for Pain and Suffering were Clearly Excessive.

The jury awarded Susan Von Stetina $4.1 million for pain and suffering. In the circumstances of this case this award is unsupportable.

Appellants do not deny the tragedy of this case. No one would change places with Susan Von Stetina for all the money on earth. One reason why this is true is that Susan Von Stetina, whose brain is dead and who hangs on to life at a level less than fully human, is unaware of the extent of her bank account. However many millions a jury awarded her, either out of sympathy for her or anger at Florida Medical Center,* will make no difference in her life.

Knowing that appellee will label this last statement callous, appellants pause to fully explain: Susan Von Stetina is greviously injured.

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* The trial court's handling of the issue of punitive damages contributed to this excessive verdict. On the first day of trial (T. 1526), plaintiff's counsel indicated he intended to seek punitive damages. At voir dire, therefore, both plaintiff and defense counsel made repeated reference to punitive damages in questioning potential jurors (T. 45, 75, 118, 153, 234; A. 167-80). Plaintiff's counsel began to lay the foundation for his verdict by informing the panel that his client was brain-dead as the result of the actions of the defendant and that he was seeking damages to compensate her for her past and future injuries and for punitive damages which "go beyond compensatory damages and are intended as punishment" (T. 45; A. 168). In response to that inquiry, counsel for the defendant explored punitive damages with the prospective jurors (T. 118, A. 173). All parties and the court proceeded through voir dire and trial on the assumption that plaintiff was seeking punitive damages.

Since punitive damages were an issue in this case, the defense counsel could not properly object to evidence that was admissible on punitive damages.

(footnote continued on next page)

She almost died and was saved only after severe damage to her brain. She is kept alive by close care. She was, at time of trial, being cared for in a facility which cost approximately $84,000 a year and this care was praised by all witnesses. The jury award -- based on testimony of a witness who was challenged by the defense as not having been previously identified as an

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(footnote from previous page)

The claim was ultimately dropped, probably because of doubt that punitive damage could be justified against the Hospital. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). They certainly cannot be assessed against the Fund. Florida Patient's Compensation Fund v. Mercy Hospital, 419 So.2d 348 (Fla. 3d DCA 1982).

The strategy of referring to punitive damages during the voir dire was calculated to make the jury think in terms of punishing the defendant at the outset of the proceeding. Thereafter, the trial court refused the defense request that the jury be instructed that they could not award compensatory damages on that basis. The "cold neutrality" of the jury was therefore destroyed. See Bullock v. Branch, 130 So.2d 74 (Fla. 1st DCA 1961).

Counsel for the Fund clearly made the point that "You [the trial court] are going to permit him to make the same exact argument he could make were punitive damages going to the jury" and "it's just going to be reflected in a compensatory verdict" (T. 1799). The trial court saw nothing wrong with this, answering, "I assume that's his strategy." (Id.) The trial court was cavalier about these tactics, but the law does not allow the casual award of punitive damages labeled as compensatory. See School Board of Palm Beach County v. Taylor, 365 So.2d 1044 (Fla. 4th DCA 1978).

Plaintiff below was in essentially the same situation as defendant in Jones v. Flowers, 293 So.2d 765 (Fla. 3d DCA 1974). In that case, defendant presented evidence on contributory negligence, and argued it to the jury but then, like plaintiff below, requested the court not to charge the jury on the law of contributory negligence. The Third District found reversible error, saying, "in effect, the appellees received the full benefit of contributory negligence as a defense without having the issue submitted to the jury." 293 So.2d at 766.

expert* -- increased the level of care from $84,000 a year to $188,000 a year in order to provide every conceivable element of care including constant nursing attention to comfort Susan Von Stetina.

After this award for full and ideal care, there is nothing more that can be done. Susan Von Stetina can not be further comforted by the $4.1 million dollar award for she can have no understanding of it. There is nothing else to buy with the money because the $188,000 per year has already bought everything.

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* The jury returned a verdict awarding damages to plaintiff which closely approximated the figures testified to by Mrs. Burke. (Her testimony, T. 1443-1474, is reprinted at A. 427-59). Yet Mrs. Burke should not have been allowed to testify because she had not been identified as an expert witness prior to trial, contrary to the pretrial agreement of the parties which is clearly established on the record (A. 268).

When defense counsel sent plaintiff its list of witnesses, all expert witnesses who testified at trial were clearly identified as experts. When plaintiff sent its list, the same thing was done -- with the exception of Mrs. Burke, who was not identified (see No. 16 of Plaintiff's Pretrial Catalog, reprinted in A. 249). Plaintiff's counsel had flatly represented (falsely, as it turned out) that all expert witnesses were so listed (A. 272, 292). Defendant therefore had no opportunity to depose Mrs. Burke before trial, although it was made clear that all experts listed by plaintiff would be deposed in lieu of requiring plaintiff's response to defendant's expert witness interrogatories (T. 1450; A. 307-308).

Defendant was therefore led to assume that plaintiff would rely on the evidence of Susan's current expenses at a moderately expensive nursing home (A. 326-328). At trial, however, defendant was surprised when plaintiff presented Mrs. Burke, who would testify for ideal monthly nursing care of $15,232.50 (T. 1471, A. 456), rather than plaintiff's current care of $7,000 a month (T. 1473, A. 458).

The testimony provided by Mrs. Burke was not duplicated by that of any other witness. She provided line by line estimates of the elements of damage for future medical and nursing care. Its impact on the jury was obviously great. Reversal is therefore required. See Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981) (surprise and prejudice key factors in determining whether a witness should be excluded).

All her needs will be satisfied by the round the clock ideal medical and nursing care she will be provided. The only thing that can be done with the millions of the pain and suffering award is something that is barred by a decision of this Court in Loftin v. Wilson, 67 So.2d 185, 190 (Fla. 1953):

> When the sum [awarded for pain and suffering] is invested, it will yield a return to the plaintiff in excess of his entire annual earnings prior to his injury, leaving the principal amount intact at his death to pass to his heirs. Such result is contrary to the original intention of the law providing compensatory damages for those who have suffered personal injuries (Emphasis added).

The Fourth District's explicit refusal to follow the Loftin decision is explained by its adoption of plaintiff's argument that she "experiences the ultimate nightmare" every "waking moment." What she experiences is, to all of us, a nightmare, but Susan Von Stetina is unaware of her own situation. More to the point, there is nothing an award even of $4 million for intangibles can do to improve Susan's situation.

In this precise situation, the United States Court of Appeals for the Fourth Circuit has recently held that a $1,300,000 award for "loss of enjoyment of life" to a comatose patient was not recoverable as a matter of law as compensatory damages. The Court held:

> It is perfectly clear, however, that an award of $1,300,000 for the loss of enjoyment of life cannot provide him with any consolation or ease any burden resting upon him. The award of the cost of future medical care provides for his nursing and professional care. It provides all of the money needed for the plaintiff's care, should he live out his life expectancy. He cannot use the $1,300,000. He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away. If paid,

> the money would be invested and the income accumulated until Flannery's death when it would be distributed to those surviving relatives of his entitled to inherit from him. If it is compensatory in part to any one, it is compensatory to those relatives who will survive him. Since the award of $1,300,000 can provide Flannery with no direct benefit, the award is punitive and not allowable under the FTCA.
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> Flannery v. United States, No. 80-1563 (4th Cir. Sept. 21, 1983)(Slip op. at 6.) (A. 648).

Every word of this holding, except for the references to gender and the FTCA, is applicable to the case before this Court, and illustrates why the $4.1 million pain and suffering award in this case is clearly excessive, if not wholly improper. Appellants are entitled to a retrial on damages.

II.

THE FOURTH DISTRICT ERRED IN HOLDING THE LIMITATION OF LIABILITY UNCONSTITUTIONAL.

A. Invalidating the Limitation of Liability Effectively Invalidates The Fund's Contract With Its Members.

This Court, in its recent opinion in Department of Insurance v. Southeast Volusia Hospital District, ___ So. 2d. ___, 8 Fla.L.Wk. S.Ct. 354 (Fla., Sept. 15, 1983), (rehearing pending), recognized that the Fund statute (Section 768.54) is in essence a contract between the Fund and its members.

> Section 768.54(3)(c) specifies the terms of the Fund's contracts with its members. The Fund, which commenced operations in 1975, is a non-profit entity which provides medical malpractice protection to the physicians and hospitals who join it. Id. at S.Ct. 355.
>
> (Emphasis added.)

The Court also rejected a due process attack on the entire concept of the Fund since "the provisions of the statute plainly satisfy the purpose of the statute, namely, to provide medical malpractice protection for Florida health care providers under terms accepted by the participants." Id. at S.Ct. 356.

Reflection on these statements from this Court will show that the courts below have snatched from Florida Medical Center, retroactively and unforeseeably, the very "medical malpractice protection" for which it paid pursuant to a statute whose validity this Court has upheld.

The plain language of the statute, repeated numerous times in both the text and titles of the statute, offered Fund members a "limitation of liability." Section 768.54(2)(b) provides that "a health care provider shall not be liable for an amount in excess of $100,000 per claim" if it is a member in good standing of the Fund. (Emphasis added.) This sentence was intended to immunize health care provider Fund members from liability in excess of that amount. Limitation of liability is the very heart of the Fund's contract with its members.

The plain intent of the Fund statute, section 768.54, as enacted as part of the Medical Malpractice Reform Act of 1975, is reflected in its organization:

(1) DEFINITIONS
(2) LIMITATION OF LIABILITY
(3) PATIENT'S COMPENSATION FUND

As the titles and the text of the statute make clear, in return for paying the fees and assessments set out in Part (3), health care providers get the benefit of the "limitation of liability" set out by part (2). In effect, the Fund provides protection from liability, and is expressly "created. . . for the purpose of paying that portion of any claim [for medical malpractice]

malpractice defendants.* See Chapman v. Dillon, 415 So.2d 12 (Fla. 1982) (upholding "no-fault" scheme replacing common law tort liability); Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974) (similar).

Just like the situation in workers' compensation, when a fund is created to replace the individual common law action, the limitation of liability which the former defendant (or class of defendants) receives is not unconstitutional. See Walker & LaBerge v. Halligan, 344 So.2d 239 (Fla. 1977). It is irrelevant that, in a given case, a workers' compensation plaintiff might recover only a part of what he might have obtained in a common law action. Since the Patient's Compensation Fund does not "abolish or totally eliminate a previously recognized cause of action," Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981), pet. denied, 411 So.2d 383 (Fla. 1981), but instead creates a new source of funds available to pay plaintiffs after a tort suit is concluded, the Fund does not deny anyone any right under Article I, Section 21.

C. The Statute Does Not Encroach On Any Inherent Judicial Power.

The only ground on which the Fourth District found fault with the "limitation of liability" provisions of the Fund statute/contract was that the terms "impermissibly encroached upon the powers granted exclusively to the judicial branch of the government." To say that the creation of a Fund to pay

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* Many health care providers in Florida are not required to be insured or otherwise financially responsible.

which is in excess of the limits as set forth in paragraph (2)(b)." Section 768.54(3)(a).

This is the contract offered to Florida health care providers by the legislature and accepted by those who rejected other options for their protection and elected to join the Fund.*

As the Fourth District recognized, the Fund is not simply "a trust fund in the nature of liability insurance" for its members but also "restricts the plaintiff's right to recover her judgment" from the Fund member. Opinion at 4. The Fund, in other words, is not an additional source of payment for plaintiffs but rather a substitute source of payment.

B. The Statute Does Not Deny Malpractice Plaintiffs "Access to Courts" Within The Meaning of Article I, Section 21 of the Florida Constitution.

Although the Fourth District silently rejected the argument that the Fund "limitation of liability" provisions deny plaintiffs "access to courts," when the Court understands why there is no "access" problem with the Fund limitation of liability provisions, it will see why there is no constitutional problem with the statute under any theory.

Essentially, the Fund was created as a substitute source of payment of that portion of medical malpractice claims above $100,000. This is a wholly "reasonable alternative" to the common law status quo, Estate of Roberts, 388 So.2d 216 (Fla. 1980), in which plaintiffs would sue, and attempt to get payment from, individual medical

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* In this context, the policies of the contracts clause support the Appellants' position. See Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980).

plaintiffs, substituting for those formerly liable, violates the separation of powers, is, at first glance, bizarre.*

Nor does reflection on the cases we find in the opinion of the trial court or the Fourth District (the latter two being identical on this point) remove this impression. If the limitation of liability provision is unconstitutional, then so is worker's compensation, which also modified defendant's common law liability, and indeed removes a large body of cases from the courts, something this statute does not do. The Uniform Contribution Among Joint Tortfeasors Act, Section 768.31, Fla. Stat., also changes common law liabilities of defendants in tort cases, but is plainly constitutional. See Village of El Portal v City of Miami Shores, 362 So.2d 275 (Fla. 1978). The Florida sovereign immunity statute has immunized individual employees while allowing a sharply limited source of payment from the state or its agencies or subdivisions. Chapter 768.28, Fla. Stat., upheld in Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981). This Court in Chapman v. Dillon, 415 So.2d 12 (Fla. 1982), upheld the Florida no-fault statute, which completely eliminates liability for nonpermanent injury. None of these statutes, like the Fund statute, even raise separation of powers issues.

The separation of powers provision of Article II, Section 3, of the Florida Constitution states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No

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* Indeed, this tortuous construction of the Fund statute by the Fourth District is in direct conflict with that more reasonable construction presented by the Third District in the earlier case of Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980). There, the Fund statute was read as a substantive limitation of the plaintiff's right to recover against a defendant-hospital, rather than as a purported intrustion into the courts' domain. This is clearly a more proper reading of the statute's intent.

> person belonging to one branch shall exercise any powers ascertaining to either of the other branches unless expressly provided herein.

This provision must be read in pari materia with Article III, Section 1, which states that "the legislative power of the state shall be vested in a legislature of the State of Florida."

Part of this "legislative" power is power to pass statutes pursuant to the police power. See Johnson v. State, 336 So.2d 93 (Fla. 1976) ("Clearly, the legislature has the power to enact substantive law"). In Adams v. Wright, 403 So.2d 391 (Fla. 1981), the issue was whether section 768.043, which "allows a trial court to modify a verdict in a motor vehicle liability suit which is clearly excessive or inadequate," was an impermissible intrusion on the judicial power. All members of the court agreed that the relevant question was whether the statute "relates to substantive law or to practice and procedure." The majority found that the statute was substantive and upheld it.

This case is a much easier one. The limitation of liability provisions clearly "fix and declare the primary rights of individuals," Adams v. Wright, supra, 403 So.2d at 394, quoting In re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J., concurring), by determining the rights and liabilities of the Florida Patient's Compensation Fund, covered health care providers and malpractice plaintiffs. The Third District, in Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980), upheld the Fund statute against similar separation of powers objections.

Section 768.54 does not encroach on any rulemaking power. No judicial rules, existing, former or proposed, relate to the same subject matter. Instead, just like the sovereign immunity, workers' compensation,

no-fault and contribution statutes previously cited, the Fund statute adjusts the substantive rights of defendants. It creates a substitute defendant, the Fund, to help alleviate the medical malpractice crisis, pay plaintiffs and lower the cost of medical care in Florida. It follows that this clearly substantive enactment cannot fall as a statute impermissibly directed at procedural problems within the Court's domain.

In Southeast Volusia, one of the main arguments of the prevailing appellants was that, if the Fund's financing mechanisms were held to be invalid, numerous plaintiffs throughout the state would not be paid becase the "limitation of liability" provisions assured that the Fund was the only payment source. Although many plaintiffs' interests were represented before this Court as amici, no one suggested that the Fund did not replace the formerly-liable malpractice defendants.* Indeed, the Academy of Florida Trial Lawyers amicus brief argued that the Fund should be held constitutional because

> The hospitals who elected to participate in the Fund had their liability limited to $100,000 per claim and judgments have been satisfied, releases executed and settlements negotiated many of which involve periodic payment in the future.
>
> Brief at 1.

Section 768.54, of course, was upheld on substantive due process grounds by this Court in Southeast Volusia, where this Court held, in effect, that it was "plainly" valid since it "provided medical malpractice protection" to its members. Southeast Volusia, supra, at S.Ct. 356. The way that this protection is provided is the limitation of liability. The validity of

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* Pursuant to Fla. Stat. §§ 90.202(6) and 90.203, this Court is hereby asked to take judicial notice of the record in that case, in particular, the briefs and appendices filed by the parties and amici before this Court.

"limitation of liability" was thus an essential premise of this Court's earlier unanimous decision. This Court acted in Southeast Volusia to validate the constitutional power of the Fund to operate as the legislature envisioned. Just as the hospitals have to bear the burden of their contract and pay assessments, so in this case the Court must allow Fund members the contracted-for benefit guaranteed by statute. Under the Fourth District's decision, the statutory mutuality of benefit and obligation is lost, and the scheme of section 768.54 is destroyed. To reestablish the statutory contract, the judgment against the Hospital should be limited to $100,000.

III.

THE FOURTH DISTRICT ERRED IN HOLDING THE FUND'S PAYOUT PROVISIONS TO BE UNCONSTITUTIONAL.

A two-step decision is necessary on this issue. This Court must first decide whether the 1982 ("payment as incurred") or the 1976 ("maximum of $100,000") payout provision in §768.54(3)(e)3., is applicable to this case, and then decide whether the applicable statute is constitutional. Appellants assert that the more generous 1982 statute applies, and have offered, in papers filed before the Fourth District (A. 643), to begin payment of medical and nursing care pursuant to the new statute. Curiously, the plaintiffs argue for the less generous 1976 version, apparently with the hope they can thereby tempt this Court into invalidation of the payout limitation.

The 1976 provision stated:

> In the event an account for a given year incurs liability exceeding $100,000 to all persons under a single occurrence, the persons recovering shall be paid from the account at a rate not more than $100,000 per person per year until the claim has been paid in full . . .

The statute was amended effective July 1, 1982 to state:

> The amount of the Fund's liability under a judgment, including court costs, reasonable attorneys' fees and interest, shall be paid in a lump sum, except that any claims for future special damages [future medical care and lost earnings] shall be paid periodically as they are incurred by the claimant. If the claimant dies while receiving periodic payments, payments for future medical expenses shall cease . . .

Both statutes defer the payment of malpractice awards, thus tending to reduce the cost of health care and facilitate the operation of the Fund. At the effective date of the new payout provision, the verdict and judgment had been entered but post-trial motions were still pending before the trial court. The trial court decided that the 1976 payout limitation was unconstitutional in an order dated May 28, 1982, before the effective date of the new law.* The 1982 law had been signed into law on April 28, and was presented to the trial court in a post-trial motion of the Fund before the trial court's decision on the payout question. (A. 514).

A. The 1982 Payment Provisions Are Applicable To This Case.

The Fund argued to the Fourth District that the 1982 statute should apply by virtue of the settled rule that an appellate court applies the law in effect at the time of the decision, even if there is an intervening statutory

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* There is nothing in the trial court's order or the opinion of the Fourth District which demonstrates any attempt to construe the 1976 payout limitation to render it constitutional. For instance, it could have required $100,000 payment of principle plus interest on the balance, or it could have displaced the $100,000 figure to the extent required under the facts of the case rather than invalidating the entire payout limitation concept.

amendment on a substantive* matter. See Florida East Coast Railway v. Rouse, 194 So.2d 260, 262 (Fla. 1967); Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974); Summerlin v. Tramill, 290 So.2d 53 (Fla. 1973); Ingerson v. State Farm Mutual Automobile Insurance Co., 272 So.2d 862 (Fla. 3d DCA 1973); General Capital Corp. v. Tel Service Co., 212 So.2d 369 (Fla. 2d DCA 1968), aff'd., 227 So.2d 667 (Fla. 1969). See also Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975), where this Court ordered application of the Joint Tortfeasors Act, which had been passed while appeal to this Court was pending.

The Fourth District rejected this argument without, it is fair to say, coming to grips with it, saying only: "we also reject the Fund's argument that retroactive application is not required because the plaintiff's rights do not vest until this decision is published." Opinion at 4.

This Court should correct the error of the Fourth District by ordering the application of the current payout provision. This Court has consistently followed the rule that the version of a statute in effect at the time of appeal governs. In other words, when no vested rights intervene, the issue is what current law requires, not whether a lower court was correct under the law as it was at the time of its decision.

1. There would be no retroactivity in application of the current payment limitation.

The Fourth District's refusal to apply the payout provisions then in effect was based on its determination that "statutes must not be given retroactive effect unless an intent to do so is clearly expressed." Opinion

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* The label "substantive" has been used in different ways. The word is used here in its broad, "separation of powers" sense, as meaning, "within the proper realm of legislative action."

at 4. This is a principle which appellants accept. The statement is, however, inapplicable to cases where the statute is modified while the case is still on appeal. Then, in the eyes of the law, under Rouse, Goodfriend, and the other cases cited, application of current law is simply not retroactive.

This case provides a good example of why there is often no retroactivity in applying the Rouse rule. At the time of the effective date of the new act, the Florida statutes limited payment of plaintiff's judgment to $100,000 a year but the limitation was effective for only one month. Thereafter, the trial court would have authority, under the new statute, to order payment of expenses as incurred. At the time of the Fourth District's decision, plaintiff's judgment was on appeal and stayed pursuant to the posting of a supersedeas bond. See City of Plant City v. Mann, 400 So.2d 952 (Fla. 1981). The issues on appeal included whether or not there were reversible errors so that defendants would be entitled to a new trial, and whether the amount of the verdict was excessive. Plaintiff had no right of execution against the judgment nor a right to any immediate use of it. In these circumstances, application of the current statute--which is more favorable to the plaintiff--was clearly appropriate.

As additional authority, appellants cite two federal cases. In Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969), the United States Supreme Court held that a mandatory H.U.D. decree that tenants could not be evicted without receiving a prior written statement of reasons applied even to evictions begun before the date of the new rule, so long as they were on appeal. The Court held there were no "vested" rights in the landlord, "since petitioner has not yet vacated" and the appeal was not yet

resolved. Thus the Court applied the "general rule" that "an appellate court must apply the law in effect at the time it renders its decision," noting, contrary to the main argument of plaintiffs below*, "this same reasoning has been applied where the change was consitutional, statutory, or judicial." Id. at 281-83 (citations omitted). The same is true here. Since no damages have yet been paid, Plaintiff has no arguable vested right to seek application of the earlier statute, which is less favorable to her in any case. See also, Bell v. City of Milwaukee, 536 F.Supp. 462 (E.D. Wis. 1982).

2. Plaintiff has no vested substantive right which would be defeated by application of the new statute.

The concerns about retroactivity mentioned by the Fourth District do have some play in this area. There is an exception to the rule that current law applies on appeal when application of the rule would deprive a party of a "vested substantive right", Goodfriend, 289 So.2d at 712; Accord : State v. Lavazzoli, ____ So.2d _____, 8 Fla.L.Wk S.Ct. 223 (Fla., July 7, 1983)(This Court did not apply change in exclusionary rule which was detrimental to criminal defendant).

The federal courts apply essentially the same principle as the Florida Courts. The leading federal case is Bradley v. Richmond School Board, 416 U.S. 696 (1974): "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or

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* Plaintiffs argued that the rule of Rouse only applies to changes in decisional law.

there is statutory direction or legislative history to the contrary." Id. at 711.* Under either state or federal case law, there is no barrier to this Court's application of current law.

Florida cases support the idea that a party has no vested right to a particular measure of damages. In Walker & LaBerge, Inc. v Halligan, 344 So.2d 239, 243 (Fla. 1977), this Court held that "retroactive" application of the statute to a pending case was appropriate where "the nature of the statutes involved was inherently procedural or affected only the measure of damages for vindication of a substantive right."** On the latter point, the one relevant here, the Court said that "alteration of such measure of damages did not work any modification of fundamental substantive rights." Id. See General Capital Corp. v. Tel Service Co., supra.

The 1982 statute, it must be remembered, is more favorable to plaintiffs than the $100,000 limitation of prior law. It is a remedial

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* The Supreme Court rejected an attempt to find "manifest injustice" in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), where the issue was whether a federal decision requiring the jury to be instructed that personal injury damages were not subject to federal income tax should be applied only prospectively. The court held that although the trial in the case in question came before the new decision, there would be no manifest injustice in applying the new decision on direct appeal. "This equitable exception ["manifest injustice"] does not reach a private civil suit where the change does not extinguish a cause of action ...." but only changes the measure of damages. Id. at 486 n. 16. Similarly, in the case before this Court, the only change made is in damages. In addition, the change is an improvement for plaintiff, and one intended, like the rule at issue in Gulf Offshore v. Mobil Oil, to further the policy of "fairness and efficiency" in damage awards. See Id. at 487.

** Of course, this Court in Walker & LaBerge did not and would not hold that the statute, although it changed no vested substantive rights, was therefore unconstitutional as interfering with a "procedural" matter solely within the court's realm. This would be inconsistent with this court's Pinillos case, which held that a statute changing the measure of damage in medical malpractice cases did not violate the separation of powers.

amendment by which the Legislature solved most of the "problems" cited by the Fourth District. It makes no division between malpractice victims based on the seriousness of their injuries; does not prevent settlement by the Fund; and allows full recovery of all damages awarded to plaintiffs. Its use is not manifestly unfair to plaintiff.

3. Application of the Current Statute Is Mandated By this Court's Proper Relationship With The Legislature.

The Fourth District recognized that a statute which is "remedial" applies while a case is on appeal. This is just such a statute.

The legislature, aware of the problems with the $100,000 maximum payout provision which could arise in a particular case*, acted to amend the statute to ensure that medical malpractice plaintiffs with claims against the Fund would receive all the medical care they need, as it is needed. Since the new statute is, as we demonstrate, less subject to constitutional objections than the old one, this Court has an additional reason to apply the new statute.

Federal courts have been particularly sensitive to apply current versions of a statute when its constitutionality is challenged. In Fusari v. Steinberg, 419 U.S. 379 (1975), the U.S. Supreme Court faced the issue of whether an unemployment benefits statute was unconstitutional. There were statutory amendments after the time of the decision on appeal "designed to remedy the problem" with the earlier statute. The Legislature in that case

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* At the trial court level, the $100,000 payout limitation was held inapplicable to the case of Reyes v. Miller, Case No. 79-15099 (CA 12)(11th Cir. Fla., Dec. 11, 1980). The legislature apparently wanted to avoid a constitutional issue, and a harsh result in some cases, by accomplishing its intended results more flexibly.

also acted to correct the problems of an earlier version of the statute. In those circumstances, identical to those before this Court, the unanimous federal high court held: "This Court must review the District Court's judgement in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered." Id. at 387. See Diffenderfer v. Central Baptist Church of Miami, Florida, 404 U.S. 412 (1972).

Florida courts agree that courts strive to avoid unnecessary constitutional issues (such as the validity of the $100,000 payout limitation), and to give effect to the intent of the Legislature, rather than to frustrate the legislative purposes. See Florida State Board of Architecture v. Wasserman, 377 So.2d 653 (Fla. 1979); State v. C.H., 421 So.2d 62 (Fla. 4th DCA 1982). The Fourth District's disregard of the Legislature's remedial amendment shows disdain, rather than respect, for the Legislature.

In summary, therefore, the payout amendment does not extinguish any cause of action, but only rationalizes payment of damages, in an effort to maximize fairness to malpractice plaintiffs and defendants. Plaintiff is not yet entitled to receive damages, however they are paid, and so there is no retroactivity.* This application is not unfair to plaintiff since the change in the law is more favorable to her. The Legislature's attempt to ameliorate the harshness of the $100,000 limitation in particular cases should be respected. For these reasons this Court should order the application of the current payout provisions of the Fund statute.

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* Moreover, the Fund has offered to pay damages at this time pursuant to the current payout statute (A.643).

B. The 1982 Payout Provisions are Constitutional.

If this Court concludes, as Appellants urge, that the current ("payment of damages as incurred") provisions are applicable, this Court must reach the issue not addressed by the Fourth District: whether the new payout provisions are constitutional.

Most of the constitutional objections of the Fourth District to the $100,000 statute are irrelevant to the current version of the statute. The statute would allow payment of all of "her necessary expenses for medical care", opinion at 6; does not "prevent good faith settlements" or "require all malpractice actions in which a claim greater than $100,000 is made to be tried" opinion at 6, and does not "single out the most seriously injuried malpractice victims," opinion at 7.

1. The Payout Provision Does Not Violate Due Process Or Equal Protection.

The Fourth District expressed great confusion over the applicable analysis in cases where a statute is challenged under the equal protection and due process clauses. The Fourth District confessed to be lost in the verbiage of the various equal protection and due process "tests", opinion at 12-13, and admitted it did not have sufficient "time" to "craft [its] own version of the unconstitutionality of the statute." Opinion at 12. Nowhere was the court's confusion more clear than in its adoption of the trial court's reasoning that

> The [payout provision of the] statute* arguably

* The Fourth District was addressing the 1976(maximum of $100,000) payment limitation, but the same rational basis would be applicable for the 1982 statute.

> satisfies one minor aspect of these tests: it "bears a reasonable relation to a permissible legislative objective", Opinion at 5, emphasis added,

but that it was nonetheless unconstitutional under the "rational basis test."

All this confusion and uncertainty was unnecessary. In a case such as this one which involves the "rational basis" test, the equal protection clause only "requires that a statute bear a reasonable relation to a legitimate state interest," Pinillos, supra, 403 So.2d at 367.* This is the same as the normal substantive due process test. Southeast Volusia.

If this Court agrees with the Fourth District that the payout provision has a rational basis, it need go no further. The payment-as-incurred provisions plainly have a rational basis. The statute aids the operation of the Fund and combats the malpractice crisis. It also insures more precise and accurate damage awards since the jury's guess as to life expectancy and the medical care that a plaintiff will ultimately need will not have decisive significance and knowledge gained in the future about a plaintiff's needs can be incorporated into payment of damages.

In any given case, the figure ultimately paid out under the 1982 payout provision may be higher or lower than the jury's lump sum award, but, given the integrity of the assessment mechanism under this Court's decision in Southeast Volusia, the money will be available even if plaintiff has greater than anticipated medical problems. In the case before this Court, plaintiff

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* See also State v. Leicht, 402 So.2d 1153 (Fla. 1981), cert. denied, 455 U.S. 989 (1982); Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State, 392 So.2d 1296 (Fla. 1981); Department of Health & Rehabilitative Services v. Heffler, 382 So.2d 301 (Fla. 1980); North Ridge General Hospital, Inc. v. City of Oakland Park, 374 So.2d 461 (Fla. 1979); Hamilton v. State, 366 So.2d 8 (Fla. 1978); Lewis v. Mathis, 345 So.2d 1066 (Fla. 1977).

resists payment of damages as incurred, apparently convinced that the lump sum provides more money than plaintiff needs. While this position of plaintiff's supports the Fund's argument that the verdict was excessive, plaintiff has no right under the equal protection or due process clause to the receipt of more damages than are needed to compensate her.

The policy objections to the 1976 statute which the Fourth District expressed, even if applicable to the current version of the statute, were irrelevant. Having found that the statute "passed" the applicable test, it was error to "grade" the statute further. A passing grade, and not the honors mark of judicial approbation, is all a statute needs under the Florida and Federal Constitutions.

2. The Statute does not Violate the Separation of Powers.

The only remaining issue is whether the statute, in setting a new definition for the substantive entitlement to damages in malpractice cases, violates the separation of powers. Apparently the courts below believed that any statute controlling the Fund's payout of claims "merely controls the manner in which judgments are to be paid," and therefore violates the separation of powers.* Opinion at 5.

This erroneous holding is extremely important, and could be of far-reaching consequences. It would invalidate all the provisions of the Fund statute which regulate the payment of claims: for example, those which require the Fund to keep separate payment records for each Fund Year, and pay

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* The Fourth District recognized that it could read the statute as a substantive requirement, which would of course moot any objection. The Court erred in not doing so. See, e.g., Southeast Volusia.

claimants in each Fund Year only in the order in which the claims matured to settlement or judgment. These provisions, of course, do not interfere or clash with any inherent power, rule, or function of any court, and it would be senseless to hold them unconstitutional on separation of powers grounds. But the same is true of the payout amount limitation at issue here.

The Fourth District went wrong when it contradicted itself on whether the payout provisions were substantive. The statute regulates the manner the Fund, an entity created by the Legislature to provide health care providers with protection from excess medical malpractice liability, can satisfy judgments against it. The purposes of the statute are legitimate police power purposes: to insure the solvency of the Fund, so that its important role of providing medical malpractice protection is not compromised*; to allow the Fund to make more accurate predictions of the scope of potential liability, once the existence of a claim is known, and thereby to encourage settlement**; to deemphasize the uncertain process of projecting future damages; and to allow the Fund to function without the need of frequent assessments against members each time a new judgment is entered against the Fund, thereby reducing the uncertainty of member health care providers about their immediate malpractice liability.***

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* A staff report on Ch. 76-260, Laws of Florida, described the purpose of the $100,000 payout provision of prior law as "to make the PCF actuarially sound." (See A.72).

** The Fourth District held in upholding the constitutionality of Section 768.56, Fla. Stat., (the medical malpractice reasonable attorneys' fee statute) that encouraging settlement of disputed claims is a valid objective.

*** Concern with the size and unpredictability of insurance provisions for medical malpractice was a large part of the Medical Malpractice Crisis of 1975. See Preamble to chapters 75-9 and 76-260, Laws of Florida (A. 54-55 and A. 64-65).

The Fourth District correctly recognized, indeed was "firmly of the opinion", that the payout provisions "affects a substantive matter." Opinion at 4. The many statutes passed in an attempt to alleviate the perceived medical malpractice crisis are valid as substantive law. In Pinillos v. Cedars of Lebanon Hospital Corp., this Court upheld a statute which deducts moneys which were formerly "collateral sources" from medical malpractice damages against a "separation of powers" attack.

In Southeast Volusia, previously cited, this Court found the concept of the Florida Patient's Compensation Fund to be constitutional. The payout provision was enacted for many of the same substantive reasons as the rest of Section 768.54 and all the other medical malpractice statutes the courts of Florida have consistently upheld. The Fourth District recognized that the payout provisions were substantive law. The Fourth District was thus, by definition, in error when it held that the statute was void as encroaching on inherent judicial power. As demonstrated earlier, the legislature has unquestioned authority to pass substantive law and it is only legislative intervention on "practice and procedure" that raises questions under Article II, Section 3 of the Florida Constitution. See Johnson v. State, supra; Adams v. Wright, supra.

The broad consequences of "separation of powers" reasoning such as that of the Fourth District shows that such an approach is not only inconsistent with the cases cited above but provides an arbitrary limit on the legislature's power to create law pursuant to police power. This was illustrated by the Fourth District's gratuitous invalidation of section 768.51, Fla. Stat., which authorizes trial courts, in an appropriate case, to order the payment of damages as they are incurred in any medical malpractice

case. See opinion at 11-12.*

If the Fourth District is correct, any statute which affects a judgment would be unconstitutional. Under the Fourth District's reasoning, since every statute which affects either liability or damages, or the various postjudgment execution remedies (which are statutory, of course) affect a judgment, all such statutes are unconstitutional. For separation of powers purposes there is no distinction between the statute as passed by the legislature and any statute which limits the maximum amount of a judgment against any or all defendants. Such statutes do not affect the inherent power of any court. A persuasive analogy is workers' compensation, a scheme which has totally replaced common law liability of employers. This scheme replaces the traditional common law judgment against employers, but its validity is unquestioned. Indeed, in Johnson v. R.H. Donnelly Co., 402 So.2d 518 (Fla. 1st DCA 1981), pet. denied, 415 So.2d 1360 (Fla. 1982), it was specifically held that a statute ordering payment-as-incurred damages in workers' compensation cases was constitutional, because it assured that payments would be used for their intended purpose.

Such areas are within the power of the legislature to change in response to changes, crises, or perceived problems. It may be that experience will prove "payment as incurred" provisions for tort damages are unworkable or undesirable. On the other hand, it may be that this type of payment of damages will be adopted in more and more substantive areas. Only time will

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* The Fund argued below, as an alternative position, that section 768.51 should be applied to the Fund. The Fund still holds the same position, but will not pursue it in this Court in view of the numerous other issues at stake. This Court must, however, validate the statute, to remedy the Fourth District's alternative holding that the statute is unconstitutional. If the Court is convinced that the Fund's payout provisions are valid, section 768.51 will be valid as well.

tell; the issue of how workable such payment turns out to be is a factual one and the Constitution places the judgment of these facts with the Legislature. It is the Legislature which, under our Constitution, has the task of deciding which substantive laws will work.

C. Even if the 1976 Payout Provision Applies, the Statute is Constitutional.

Assuming for the purposes of this section of the argument that this Court decides the 1976 statute is the one that is applicable, it would still be constitutional "as applied to the facts of this case." The key premise of the Fourth District's contrary conclusion under the Equal Protection and Due Process clauses* was that $100,000 is "slightly over one-half of the sum needed to keep her alive presently," opinion at 6. We might agree that a statute which insured that a medical malpractice victim would have insufficient funds to be kept alive would be irrational. However, $100,000, as applied to the facts of this case, would be enough to care for plaintiff's needs in an adequate manner. As the Fourth District recognized in an inconsistent portion of the opinion, the $188,400 figure of annual care found by the jury represents "the present day annual cost of ideal care for this patient." Opinion at 3. The trial transcript shows that plaintiff is currently being cared for at an annual cost of $84,000 a year, and all the trial testimony was that the care was excellent and satisfactory to all witnesses (Tr. 1473, 1419, 1422, 1429).

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* The old statute did not violate the separation of powers for the same reason as the new statute: as the Fourth District recognized, it was substantive law.

As applied to the facts of this case, therefore, we are dealing with a reasonable substitute remedy, and not a reduction of damages below the minimum needed for adequate medical care.* Our primary position remains that the Court need not reach this issue since the payout provisions of the current law are plainly valid under the relevant constitutional tests. The contrary view of the plaintiff, who would have this Court apply a harsher statute to find it unconstitutional, despite the legislature's attempt to remedy the very problems plaintiff points to, is inconsistent with this Court's proper role of deference to the legislature. The Fund therefore urges this Court to apply, and validate, the "payment as incurred" provisions of current law.

D. If the Judgment is Not Structured As Contemplated by §768.54, Future Elements of Damages Must Be Reduced to Present Value By This Court or at Retrial.

The jury found, as both courts below have recognized, the future elements of damage by "simple arithmetic." Thus $188,400 medical expenses per year times 40 years yielded the $7.5 million future medical and nursing care award. Similarly, $375 a week lost earnings times 34 years (both figures from plaintiff's counsel's closing argument) equal the $663,000 lost earnings award. It is apparent that there was no "reduction to present value" in this simple arithmetic, as required by the Florida statutes, §768.48 (1987).

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* The trial court and the Fourth District noted that statutory interest on the judgment would be greater than $100,000 a year. If the statute is read as requiring that no interest be paid, there is no constitutional objection -- plaintiff has no constitutional right to postjudgment interest, at most to reasonable compensation. Alternatively, the statute can be read as allowing interest on the judgment to be paid in addition to $100,000 a year. In this case, there would be generous compensation of plaintiff -- over a million dollars a year. It is well settled that, if necessary, this Court will interpret a statute to save it from unconstitutionality. Southeast Volusia at S.Ct. 356.

The theory of reduction to present value is stated in Seaboard Coast Line R. Co. v. Garrison, 336 So.2d 423, 425 (Fla. 2d DCA 1976):

> The plaintiff will be able to profitably invest his award, so that less money now is required to compensate him for money which, absent defendant's negligence, he would not have received until some future date.

Since the Florida statutes on medical malpractice only allow the recovery of sums reduced to present value, it is part of a malpractice plaintiff's burden of proof to put in evidence of reduction of damages to present value. See Seaboard Coast Lines R. Co. v. Burdi, _____ So.2d ____, 8 Fla.L.Wk. DCA 745 (Fla. 3d DCA 1983) (the court expressly reserved the question, but noted "it is the plaintiff whose right vel non to recover for future monetary losses is limited by the reduction requirement").

Plaintiff presented no "sound and substantial economic evidence" of reduction to present value, Garrison, supra, 336 So.2d at 426. Indeed, plaintiff presented no such evidence whatsoever. Plaintiff only touched on the issue in closing argument, where it was argued that there is "no reduction necessary, the cancellation is economic." (A.140) Essentially, plaintiff's counsel argued "cancellation economics", as he termed it (A.138): inflation each year would cancel the interest rate.

Since no evidence supporting this argument was presented, as all concede, the issue is whether, as a matter of law, "cancellation economics" is the law of Florida. The future damages in the verdict stand or fall based on the validity of the "cancellation economics" argument.

It is impossible for inflation rates to consistently match interest rates, or no one would invest any money for interest and historically,

interest rates have, over time, exceeded the inflation rate. Several recent courts have recognized this, holding that it is improper to rely on "cancellation economics." Jones & Laughlin Steel Corp. v. Pfeifer, 51 U.S.L.W. 4795 (U.S. S.Ct. June 15, 1983); Culver v. Slater Boat Co., 688 F.2d 280 (5th Cir. 1982) (en banc).

If the Court properly applies the payout limitation of current law, then there would be no need to address the present value issue. Indeed, avoidance of the technical issue of reduction to present value, which by definition involves a speculative forecast of the future by juries, and has sharply divided the courts, see Annotation, 21 A.L.R. 4th 21 (1983), is one advantage of the payout provision of current law.

Should, however, the Court hold lump sum payment of the award to be proper, as the Fourth District believed, the staggering overcompensation of the plaintiff as a result of the plaintiff's failure to present evidence of reduction to present value must be corrected. Even at the minimal two percent differential of a case relied on by plaintiffs before the Fourth District, Doca v. Marina Mercante Nicaraguense, 634 F.2d 30 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981), a $2.4 million savings in future medical care would result.* This difference is so fundamental a new trial on damages is required even under this conservative assumption.

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* This is calculated based on annuity tables, of which the Fourth District was asked to take judicial notice. See Reply Brief No. 1 at 29-30 and Appendix thereto.

IV.

THE AWARD OF ATTORNEY'S FEES IS EXCESSIVE AND UNGUIDED BY ANY STANDARD.

The Fourth District held that the trial court's award of a "reasonable attorney's fee" was improper and reduced the trial court's $4.4 million award to $1.5 million. The defendants again challenge that award as not justifed on the facts of this case and contrary to the standard for awarding a statutory reasonable attorney's fee. Concededly, there has been confusion in Florida decisions relating to attorney's fees. But principles strictly adhered to in federal courts and recognized in previous Florida appellate opinions suggest the desirability of a standard which awards fees according to an "adjusted hourly fee." This principle has very recently been approved by the United States Supreme Court.

The Fourth District opinion provides no objective measure for determining a reasonable fee. It adopts an intuitive approach -- guessing at facts and withholding articulation of any standard.* In this appeal, the Supreme Court has the opportunity to settle the principles which govern the award of a "reasonable attorney's fee" when provided by statute. The defendants submit that the "lodestar" approach, followed in the federal circuits and recognized by the United States Supreme Court, should be adopted as the rule of law for the State of Florida. If applied in this case, the lodestar analysis would authorize a reasonable fee between $250,000 and $500,000, substantially less than the Fourth District award.

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* So unstructured was the decision that it precludes meaningful appellate review. Indeed, its application as a construction of section 768.56, if adhered to, would render the statute unconstitutionally vague and deprive the defendants and non-prevailing parties of due process under both Florida and the United States constitutions. See Shevin v. International Investors, Inc., 353 So.2d 89 (Fla. 1977); Florida Businessmen For Free Enterprise v. State, 673 F.2d 1213, 1218 (11th Cir. 1982).

A. The Federal Approach Provides a Logical and Uniform Structure for Decision.

Although the Fourth District saw through the trial court's transparent rationalization of a contingency fee as a statutory award, the appellate court did not explain why an award of $1.5 million was proper. As the discussion below indicates, the award is manifestly unreasonable. Further, trial courts will receive no guidance under what is now the "leading" decision under section 768.56.

A cornerstone federal decision is Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), in which the Fifth Circuit listed twelve factors which are relevant to the determination of a "reasonable attorney's fee."* Over time, the Fifth Circuit became dissatisfied with awards which superficially discussed all the factors but did not articulate how each factor affected the award.** Now, the Fifth and Eleventh Circuits, as the other federal courts, have adopted the "lodestar" approach, which starts with the

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* The factors are: (1) The time and labor required; (2) the skill requisite to properly perform the legal services; (3) preclusion of other employment by the attorney due to acceptance of the case; (4) the novelty and difficulty of the questions presented; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

** In Copper Liquors, Inc. v. Adolph Coors Co., 624 F.2d 575, 581-84 (5th Cir. 1980), the Fifth Circuit reversed a trial court's award of "reasonable attorney's fees" similar to Judge Andrews'. The trial court had addressed the "laundry list" of all the relevant factors and then announced a "reasonable fee" with no clear relation to any of them except "percentage of recovery." The Fifth Circuit adopted in substance the approach of the other federal courts, the "lodestar" method, emphasizing factors (1), (5), (8), and (9).

The "lodestar" test has its origin in Lindy Bros. Bldrs., Inc. v. American Radiator & Std. Corp., 487 F.2d 161, 167-69 (3d Cir. 1974).

attorney's time valued at a reasonable hourly rate and adjusts it for contingency and special quality factors. These courts require scrupulously detailed and meaningful analysis by the trial court of each Johnson factor, essentially the factors of the Code of Professional Responsibility DR 2-106(B).

This Court should adopt the disciplined federal approach. As the Eleventh Circuit Court of Appeals explained in Fitzpatrick v. Internal Revenue Service, 665 F.2d 327 (11th Cir. 1982), "[a]n adequate explanation of the fee award is absolutely essential to appellate review; without it, review is impossible because no basis exists to judge the trial court's exercise of discretion." Id. at 332. The Eleventh Circuit insisted that a "perfunctory explanation simply will not suffice." Id. The Fourth District's intuitive and standardless approach mocks the reasonableness requirements imposed by the federal rule.

As for the substance necessary in the trial court's analysis, the Eleventh Circuit held:

> First, the court must "ascertain the nature and extent of the services supplied by the attorney." If the court finds the number of hours excessive, . . . it should identify the hours disallowed and explain why it is disallowing them. If the parties dispute the facts, an evidentiary hearing must be held. Second, the court must determine the value of the services rendered according to the customary charges in the area and the quality of the work produced. Special experience or expertise, or the lack of it, will be reflected in the hourly rate allowed. When the court has finished these two steps and arrived at a nominal fee, it should then consider the remaining Johsnon factors appropriate to the particular case and briefly articulate how each of these factors affect the final compensation.
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> 665 F.2d at 332 (citations omitted).

In a recent case, the United States Supreme Court focused on the primacy of hours reasonably worked to the award of a statutory attorney's fee:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documenation of hours is inadequate, the district court may reduce the award accordingly.
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> Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed. 2d 40, 50 (1983).

Fundamental fairness to non-prevailing parties who will have to compensate their adversaries' attorneys requires that the statutory "reasonable" fee be determined according to firm guidelines. As Chief Justice Burger explained in his concurring opinion:

> A claim for legal services presented by the prevailing party to the losing party pursuant to §1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the latter case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate "billing judgment," . . . and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for a payment under §1988. That statute requires the losing party in a civil rights action to bear the cost of his adversary's attorney and there is, of course, no relationship of trust and confidence between the adverse parties. As a result, the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.
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> 76 L.Ed.2d at 55 (concurring opinion).

The advantage of the lodestar approach is that it protects against an unrealistic award and is well-developed enough so that fees can be compared among cases.*

The Fourth District's decision, contrary to this substantial body of law and contrary to fundamental concepts of due process, suggests to trial judges that they may pull a comfortable figure out of the air based on a visceral feeling about the result achieved and the lawyer's performance. See Opinion below at 17. This Court should reject this "seat of the pants" approach and impose a disciplined method which will ensure fidelity to the legislative intent and fairness to parties (in this case, health care consumers through providers or as non prevailing plaintiffs) who will be required to pay attorney's fees under the statute.

B. The Florida Courts Have Evolved Towards the Lodestar Approach Without Clearly Adopting It.

Only two approaches for setting reasonable attorney's fees were suggested at the attorney's fee hearing before the trial judge: (1) percentage-of-recovery method or (2) adjusted hourly rate. The second is the preferable one. See Division of Administration, State Dept. of Transportation v. Denmark (II), 356 So.2d 15, 16 (Fla. 4th DCA 1978). Indeed, a percent-

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* The federal courts after years of experimentation in construing civil rights or antitrust attorney's fee statutes, and applying the "common fund" doctrine to successful class actions for damages, now uniformly apply the lodestar standard of an adjusted hourly rate for a reasonable attorney's fee. The standard applies in some of the most difficult, uncertain, and challenging cases for plaintiffs in American jurisprudence. Plaintiffs in these areas do not always have the sympathy and human warmth so often directed toward the victims of medical malpractice by jurors who may one day need medical care, but who are unlikely to be directly harmed by an antitrust or civil rights violation. Nevertheless, attorneys in these cases vindicate some of our most cherished values.

age-of-recovery method has been held improper in Florida and was correctly rejected by the Fourth District. See United States Steel Corp. v. Green, 353 So.2d 86, 88 (Fla. 1977).

While the Florida courts have not required any one method be adopted for determining a "reasonable attorney's fee," there is at least tacit agreement on two points: (1) the hours worked by an attorney is a highly significant factor; and (2) a per hour rate is useful as a check on the reasonableness of fees. The consideration of these factors below was inadequate even under existing Florida case law.

The Florida courts give special emphasis to hours worked in determining a "reasonable attorney's fee." The court in Manatee County v. Harbor Ventures, Inc., 305 So.2d 299 (Fla. 2d DCA 1974), for example, held

> even where a client receives huge benefits which are directly attributable to the skill of his lawyer, there must be a limit to the amount the lawyer should be entitled to receive for these services. This is one of the standards which sets the law profession apart from other ways of earning a living.
>
> While the time a lawyer spends on a given case is only one factor to be considered in setting his fee, it must be given considerable weight because as has often been said in justifying the size of attorney's fees, "a lawyer's time is his stock in trade."
>
> Id. at 301.
> (Emphasis added and footnote omitted.)

Florida cases also hold that hourly rates of compensation provide a limit on excessive fees. See, e.g., Dade County v. Oolite Rock Company (I), 311 So.2d 699 (Fla. 3d DCA 1975), cert. denied, 330 So.2d 20 (Fla. 1976); Dade County v. Oolite Rock Co. (II), 348 So.2d 902, 905 (Fla. 3d DCA 1977),

cert. denied, 358 So.2d 133 (Fla. 1978); Valparaiso Bank & Trust Co. v. Sims, 343 So.2d 967 (Fla. 1st DCA 1977), cert. denied, 353 So.2d 678 (Fla. 1977). Neither the trial court nor the Fourth District explicitly considered the amount per hour worked, much less applied that figure as a check on the fee awarded.

The uncertainty wrought upon the judiciary and the bar by the lack of a uniform standard is reflected by the Fourth District's uncertain handling of attorney's fee awards. In Division of Administration, State Department of Transportation v. Denmark, 354 So.2d 100 (Fla. 4th DCA 1978)(Letts, C.J.) ("Denmark I") the Fourth District resisted the idea that a "reasonable attorneys' fee" should be determined by using "mandatory hourly rates," id. at 103.* Yet Denmark I implicitly recognized the hourly rate as the final touchstone of reasonableness, in cases where "the fee is blatant and outrageous as, for example, it clearly was in Oolite "One." (i.e. $946.00 per hour). 354 So.2d at 103.

In a related appeal, the Fourth District explicitly checked the effective rate of the fee awarded and held $565 an hour to be excessive even for excellent legal work for which payment was contingent. Division of Administration, State Department of Transportation v. Denmark, ("Denmark II"), 356 So.2d 15, 16 (Fla. 4th DCA 1978) (Downey, J.). Accord, Security Ins. Co. v. Webster, 357 So.2d 741, 742 (Fla. 4th DCA 1978)(Downey, J.)($500 an hour condemned as excessive for condemnation case). The $946 per hour fee in

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* The straightforward hours-times-mandatory rate theory is not supported by the Florida or federal cases. See State Department of Natural Resources v. Gables-By-The-Sea, Inc., 374 So.2d 582, 584-85 (Fla. 3d DCA 1979) cert. denied, 383 So.2d 1203 (Fla. 1980); Division of Administration, State Department of Transportation v. Denmark, 354 So.2d 100, 103 (Fla. 4th DCA 1978). The defendants did not urge it below nor do we urge it here.

Oolite which the Denmark I court viewed as "blatant and outrageous" was far less than the Fourth District's conclusory award of $1500 per hour in this case.* Equally as important, the court used the amount per hour the fee represented as a check on reasonableness in reviewing the trial court.

In Denmark I, Judge Letts had expressed his concern about using an hourly rate as a talisman in determining fees:

> To us, the problem in commanding the trial court to set the fee by "so much per hour", is that such may penalize more competent counsel. It is axiomatic that an attorney of great skill, experience and expertise . . . will require less time to achieve a better result for his client than an inferior inexperienced counterpart. Are we going to penalize the former for being superior?
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> 354 So.2d at 102.

Notwithstanding the later cases, Judge Letts' reservation from Denmark I has surfaced again in this case, where he states:

> Our refusal to be governed solely by an hourly rate deserves explanation. Extremely competent counsel, within the area of his or her particular expertise, may find the right answer to a specific problem in a matter of minutes, or indeed already know it. By contrast inexperienced counsel may be required to search for that same answer for hours at a time, even assuming he or she finally arrives at it correctly. As we see it, it would be unfair to permit the pupil to out-bill the master simply because, in his or her ignorance, the former puts in longer hours.
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> Opinion below at 17.

The answer to this rhetorical question is obvious to anyone who has analyzed the problem, and forms the basis of the federal lodestar doctrine.

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* The testimony of Schlesinger's witnesses below, other prominent plaintiff's attorneys, that he was worth $5,000 an hour (AFP. 89-90), is obviously self-serving and highly suspect. Fees less than one-tenth that amount have been held excessive by the Florida courts.

More competent counsel with "skill, experience and expertise," are assigned a higher hourly rate than less experienced and less expert counsel. See, e.g., Copper Liquors, 624 F.2d at 583 n.15. Moreover, hours needlessly expended are not compensated. See Fitzpatrick, 665 F.2d at 332.

The remaining portion of this section will apply the factors governing the appropriate award pursuant to the federal "lodestar" test. As indicated above, this analysis is consistent with existing Florida law. While the values discussed stretch the outermost reaches of reasonableness and are used only to illustrate the gross error below, the defendants respectfully recommend the mode of analysis be adopted by this Court. In computing a reasonable fee, the court should "(1) ascertain the nature and extent of the services supplied by the attorney;" (2) "value the services according to the customary fee and quality of the legal work;" and (3) "adjust the compensation on the basis of other Johnson factors that may be of significance because of the particular case." Copper Liquors, 624 F.2d at 583.

1. Nature and Extent of Services Supplied by the Attorney. The starting point in the "lodestar" analysis is "the number of hours reasonably spent by the plaintiff's attorney on matters upon which the plaintiff was successful." Copper Liquors, 624 F.2d at 583, n. 15. See also Hensley v. Eckerhart, ___ U.S. at ___, 76 L.Ed.2d at 50. In this case, the plaintiffs' lawyer did not keep time records. But undisputed facts point to an extremely liberal estimate of his time of 1,000 hours. Counsel did not begin working on the case in earnest until 19 weeks before trial, tried a product liability case for six weeks approximately seven months before this trial, and spent eight days in trial and two days in jury selection in this case. Defense counsel, who attended all the hearings, depositions, etc., logged 845 hours.

2. Value of the services according to the customary fee and quality of the legal work. The defendants do not dispute that Mr. Schlesinger performed valuable services for his client. The question here is how they should be valued for purposes of awarding a statutory fee to one not a party to the attorney-client relationship. One court has held that the best measurement of this value is the "market rate." The defendants are unaware of a decision accepting a base rate over $250 per hour. There was evidence in the record that the highest paid private trial attorney in Florida makes, at most, $250.00 per hour. Under these guidelines, the maximum figure for the "lodestar," the base hourly value of Mr. Schlesinger's time, accounting for his skill and experience, could be $250 per hour.

3. Adjustments to the hourly rate based on the particular facts of the case. Analyzing the remaining Johnson criteria to adjust the hourly rate, two prominent factors to be considered are the quality of the work and the contingent nature of the outcome. Quality is measured in part by the results obtained. The defendants concede the jury returned a dramatically high verdict and that the outcome was contingent through the time of the verdict.

In Wolf v. Frank, 555 F.2d 1213 (5th Cir. 1977) the Fifth Circuit noted that the plaintiffs' attorneys "accomplish[ed] a substantial recovery for thier clients -- money which might well have been totally lost but for their efforts." Id. at 1218. The court held that such outstanding results warranted a "33 1/3% enhancement of the regular, reasonable hourly fee." Id. The court reversed a 100% enhancement.

A second factor which the court may consider is the contingent nature of success.* It looks to "the probability or likelihood of success,

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* The statutory award is in addition to the contingent fee the plaintiffs will pay Schlesinger. As the Fourth District understood, it is intended by the Legislature as an offset for the plaintiff's benefit. See Senate Staff Analysis of Section 768.56 (A. 564).

viewed at the time of filing suit." Graves v. Barnes, 700 F.2d 220, 222 (5th Cir. 1983). It includes (a) the complexity of the case, legally and factually; (b) the probability of the defendant's liability; and (c) an evaluation of whether damages are difficult or easy to prove. It also includes the attorney's risks assumed in taking the case. Id. In Graves, the Fifth Circuit affirmed a multiplier of two for extremely uncertain and protracted complex voting rights litigation which took over ten years, and which was ultimately successful.

In Andrews v. Koch, 554 F.Supp. 1099 (S.D.N.Y. 1983), the court adjusted the rate for attorneys' services according to the lodestar method. It found that the plaintiffs "achieved significant protections for their constitutional rights through the diligent and effective efforts of their attorneys." Id. at 1100. Further, the result obtained, an injunction against a city election at the eleventh hour, was viewed as "extraordinarily improbable," and thus the chance that no contingent fee would be earned was great. Id. at 1101. In view of the result and the contingency the Court awarded a total lodestar increment of 25 percent over the normal hourly rate, which ranged from $60-$100 per hour. See also In re Fine Paper Antitrust Litigation, MDI, 323 (E.D. Pa. March 3, 1983) (.5 multiplier for antitrust settlement of over $50 million).

The contingency factor enhances the hourly rate because of the uncertainty of recovery for both client and counsel. It is not a factor which ties the award to the value of the outcome. This Court has admonished that it is unreasonable per se to tie an award strictly to a percentage of the amount

which is recovered. The Court has "condemmed the practice of computing fee awards as a percentage of the ultimate benefits awarded to the claimant." United States Steel Corp. v. Green, 353 So.2d 86, 88 (Fla. 1977).

The contingency factor in the instant case is surprisingly low. The plaintiff was a sympathetic figure with visible serious injuries. As in the Swine Flu multidistrict litigation, "the likelihood that [the] plaintiffs would make substantial recoveries was always present." In re Swine Flu Immunization Products Liability Litigation, 89 F.R.D. 695 (D.D.C. 1981). Considering the time put in and the likelihood of some monetary recovery, a contingency factor of .5 would be the outermost reasonable multiplier for contigency in a case such as this.

The remaining criteria do not permit further enhancement of the rate to be applied. The uncontradicted evidence shows that Schlesinger was not precluded from accepting other employment, as he worked on some twenty other matters in the six months leading up to the Von Stetina trial. (A. 547-66). No particular time limitations were imposed by the client; the case came to trial within one year of filing. The case was in no way undesirable so as to enhance the applicable fee. Ironically, Mr. Schlesinger has received substantial public attention because of this dramatic victory. The nature and length of Schlesinger's professional relationship with the Von Stetinas is not such as to affect the award in either direction.

Finally, it is useful to examine the adjusted hourly rate awarded by federal courts in recent litigation involving some of the most dramatic and

significant problems affecting the commonweal. As the chart included in the appendix to this brief indicates, average awards in these cases, after adjustment, ranged from $55 to $390 per hour. The typical multiplier in these exceptional cases was between 1.5 and 2 times the lodestar. Therefore, an overall multiplier of two, 1 for the lodestar plus .5 for quality and .5 for contingency, should be the maximum multiplier applied in this case.

Applying the well-established principles recognized expressly in the federal courts and sub silentio in Florida, this Court can readily observe that the fee approved by the Fourth District, far from being reasonable, is outrageous. Assuming $250 per hour is the reasonable market rate for one of Schlesinger's ability, the total maximum award could be 250 x 2 x 1000 (hours) = $500,000. The undisciplined, guesswork approach adopted by Judge Letts is over three times that amount. To be true to the Legislature's command that prevailing parties recover a reasonable fee, this Court should adopt the policy of the Fifth Circuit:

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result.
>
> Northcross v. Memphis Board of Education, 611 F.2d 624, 642 (5th Cir. 1980).

The defendants urge that this Court reject the Fourth District's intuitive and standardless approach and adopt a principled standard governing statutory attorney's fees.

V.

THE STATUTE IMPOSING ATTORNEY'S FEES IN MEDICAL MALPRACTICE CASES IS UNCONSTITUTIONAL, PARTICULARLY AS APPLIED TO THIS CASE.

A. Section 768.56 Is An Invalid Exercise of The Police Power and Violates Due Process.

This sub-point attacks the constitutionality of the attorney's fee statute which was made a part of the Florida Medical Malpractice Act in 1980. The statute has been frequently attacked both in court and in learned journals.*

This point on appeal is advanced gingerly. Appellants acknowledge that the principles governing due process and equal protection analysis make any reasoned per se attack on the unconstitutionality of the attorney's fee statute under the rational basis test very difficult. As the Court now understands, however, this case has already seen some very strange turns. Should this Court adopt the view of the Fourth District which accepts without analysis the trial judge's activist version of the rational basis test, under which the limitation of liability the payout provisions are unconstitutional, then consistent application of those same novel principles will perforce invalidate the attorney's fee statute.

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* This law has been criticized as unconstitutional by nearly all commentators. For example, the plaintiff's own expert witness, J.B. Spence, who testified at the attorney's fee hearing that the plaintiff's counsel was worth about $5,000 an hour, has written a law review article detailing the ways the statute is unconstitutional. According to Mr. Spence, section 768.56 "is not a valid exercise of the state's police power," and "[i]t denies all persons equal protection of the laws . . . ." Spence and Roth, Closing the Courthouse Door: Florida's Spurious Claims Statute, 10 Stetson L. Rev. 397 (1981).

Even the principal lobbyist who testified in favor of the bill before the Legislature conceded that his organization had "serious" equal protection concerns with the law. See Proceedings Before the House of Representatives Insurance Committee, May 8, 1980, Florida State Archives.

The Fourth District employed the rational basis test to decide the validity of Section 768.56, and the defendants agree that is the proper test. The Fourth District, however, perfunctorily, and mistakenly, lumped together section 768.56 with other provisions of the Medical Malpractice Reform Act which have been held valid:

> As we see it, the only question before this court is whether Section 768.56 creates a reasonable classification which bears a reasonable relationship to a permissible legislative objective. All of the sections so far construed by the courts have the same preamble and it is unquestioned that all of them were enacted for precisely the same reasons as the sections already upheld in Pinnillos [sic] v. Cedars of Lebanon Hospital, supra; Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979) and Carter v. Sparkman, 335 So.2d 802 (Fla. 1976).
>
> Decision of Fourth District Court of Appeal at 13. (emphasis added)

In the first instance, the Fourth District was wrong when it stated that the attorney's fee statute shares the same preamble with the sections upheld in Pinillos and Woods. Section 768.56 was enacted in 1980, five years after the initial statutory framework upheld in Pinillos and Woods. It was enacted with its own separate and distinct preamble. See Preamble to ch. 80-67, Laws of Florida (A. 81).

This matter aside, the applicable test is whether the means chosen by the Legislature in the particular statute are arguably rationally related to the Legislature's purpose. See, e.g., Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981); Simmons v. Division of Pari-Mutuel Wagering, 412 So.2d 357 (Fla. 1982). The Fourth District's conclusion that one attorney's fee statute is the same as seventy others, Opinion below at 14, ignores this Court's constitutional test.

When measured against the reasons articulated for its enactment, section 768.56 reveals serious and irreconcilable internal contradictions between the express goals and the underlying premise stated in the preamble. The Legislature found, and stated in the eighth "Whereas" clause, that: "[T]he issue of liability is a primary issue to be resolved in medical malpractice litigation," in contrast to other areas of tort litigation where "damages is generally the primary issue." Building on that premise, the Legislature concluded:

> a requirement whereby the prevailing party in medical malpractice litigation is entitled to recover a reasonable attorney's fee is effective where liability is the primary issue . . . but loses its effectiveness and fairness in other contexts.
>
> Preamble to Chapter 80-67, Clause No. 9 (A. 81)

If liability is the primary issue to be resolved in malpractice litigation, questions of liability cannot be easily or objectively determined by private parties. This is precisely the reason that the judiciary exists -- to provide an impartial assessment of such issues.

The Legislature has singled out this admittedly difficult issue and imposed a penalty, payment of reasonable attorney's fees, on the nonprevailing party in every case. The sanction is uniformly applied without any requirement of a finding of vexatiousness, improper conduct, or unreasonableness of the claim or defense. The statute imposes the attorney's fee sanction upon those who are unable to predict that which the Legislature concedes cannot be predicted: the outcome of a trial on the primary liability issue. The law decries the very factual findings which underlie its own existence.

Moreover, it is obvious that the reasonable fee award does not encourage settlement. It adds to the "pot" a plaintiff will recover and this

makes financially feasible lawsuits which would not be brought otherwise. This predictable consequence -- particularly likely when a plaintiff is insolvent and immune to 768.56 -- is highlighted by cases where the attorney's fee exceeds the amount of the plaintiff's recovery. See, e.g., Baker v. Varela, 416 So.2d 1190 (Fla. 1st DCA 1982).

The statute thus frustrates its own purposes and is an unconstitutional denial of due process to losing malpractice litigants.

B. Section 768.56 is Unconstitutional as Applied Since Defendants Are Liable for Attorney's Fees When They Were Statutorily Denied the Ability to Settle This Case.

If this Court validates section 768.56 on its face under the rational basis test, it must still consider whether an award of attorney's fees against the defendants under section 768.56 is proper in this case.

As applied to defendants in general, the statutory objective is to penalize defendants whose failure to settle meritorious claims forces a legitimate claimant to try his case to judgment. At the time settlement was possible in this case, section 768.54(3)(e)3 prevented the Fund from settling claims for payments greater than $100,000 per year. The plaintiffs demanded $3 (and then $4) million up front to settle the case; they rejected a structured settlement in which the Fund offered to pay its legal limit (A.570). Therefore, it was impossible for the statute to accomplish its stated objective because neither the Fund nor the hospital could be "encouraged" to do that which was beyond its statutory authority.

The plaintiff's post-trial memorandum to the lower court recognized that the defendants were not, under section 768.54, permitted to settle in

advance of final judgment on terms satisfactory to the plaintiff in this substantial case. The plaintiffs argued:

> [T]he statute actually subverts its own announced purpose of alleviating the "medical malpractice insurance crisis", because it prevents good faith settlements and requires all medical malpractice actions in which a claim greater than $100,000.00 is made to be tried to judgment.
>
> (A. 497)

The trial court and the Fourth District agreed and found that the defendants could not legally settle large cases, adopting the plaintiffs' language verbatim:

> [T]he statute actually subverts its own announced purpose of alleviating the "medical malpractice insurance crisis," because it prevents good faith settlements and requires all medical malpractice actions in which a claim greater than $100,000.00 is made to be tried to judgment. That conclusion is compelled because, although subsection (3)(e)(1) "authorize[s the fund] to negotiate with any claimants having a judgment exceeding $100,000.00 cost to the fund to reach an agreement as to the manner in which that portion of the judgment exceeding that $100,000.00 cost is to be paid," the statute does not authorize the fund to settle claims before judgment on any terms other than those set forth in the statute.
>
> (Fourth District Decision at 6) (Emphasis added to last sentence.)

Everyone therefore agrees that the statute by its terms deprived the defendants "of any ability to compromise good faith claims, and require[d] them instead to litigate all serious claims to judgment . . . ." The plaintiffs' attorney rejected the Fund's best settlement offer and thereby

forced the defendants to go to trial.*

The lower courts' handling of the payout limitation and the attorney's fee statute reflect the manifest irrationality of the application of Section 768.56 here.** The trial judge clearly understood that one of the purposes of Section 768.56 is "to encourage the prompt and reasonable settlement of meritorious claims." (A. 30). The judge had also held, however, that section 768.54 "prevents good faith settlements and requires all medical malpractice actions in which a claim greater than $100,000 is made to be tried to judgment," because "the statute does not authorize the fund to settle claims before judgment on any terms other than those set forth in the statute." (A. 17) (court's emphasis). Neither court attempted to resolve this inconsistency between the statutes. Instead, in awarding the astronomical $4.4 million attorney's fee against these defendants, the trial judge went out of his way to say:

> [T]he Court must be mindful of the purposes of §768.56, one of which is to encourage the prompt and reasonable settlement of meritorious claims. That

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*/ Throughout this litigation, the Fund, as a statutory creature, was obligated to obey the then-existing statutory limitations on its powers. The Fund and the hospital had no alternative but to observe these statutory limitations. "Laws found upon the statute books are presumably valid, and it is the duty of [public officials] to obey the statutes until in proper proceedings they are passed upon by the courts and declared invaid or inoperative." White v. Crandon, 156 So. 303, 305 (Fla. 1934). Until a ruling by a court of this State that the law was unconstitutional, the defendants had the legal duty to abide by the law. Pickerill v. Schott, 55 So.2d 716, 719 (Fla. 1951), cert. denied 344 U.S. 815 (1952).

**/ Under section 768.54(3)(e)3 as amended in 1982, it may now be possible for the Fund to settle a case like this one because future damages are now mandatorily to be paid in the future. Therefore, to hold that the application of the attorney's fee statute against the Fund violates due process in this case will not necessarily insulate the Fund from an attorney's fee sanction under the 1982 version of section 768.54. That issue, of course, is not presented in this appeal.

> purpose can be advanced only by enforcing the statute rigorously nd literally when a medical malpractice defendant has refused to settle the meritorious claim of a medical malpractice plaintiff and has forced a plaintiff's counsel to the rigors of a full-blown trial on the merits. In this connection, the Court finds that the plaintiff's settlement demand in this case was reasonable, and that the two settlement offers made by the defendants were neither prompt nor reasonable.
>
> (A. 30-31)(emphasis added).

The trial judge thus found that Section 768.54 prevented good faith settlement for one purpose (the constitutionality of the limited liability provisions), yet ignored that effect for another purpose (attorney's fees). He blindly attempted to advance the purpose of section 768.56, despite his earlier finding that the goal could not have been accomplished in such a large case. His irreconcilable application and interpretation of the law is wholly arbitrary and underscores the due process violation wrought by the interaction of sections 768.54 and 768.56. The Fourth District, ignoring this argument in its decision, implicitly adopted this illogical and perverse conclusion.

This absence of a rational connection between the penalty and the effectiveness of its application constitutes a clear infringement of due process of law. Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 692, 695 (Fla. 1981). The result here is closely analogous to that which caused the Supreme Court of Florida to hold medical the mediation panels unconstitutional in Aldana v. Holub, 381 So.2d 231 (Fla. 1980). In Aldana, the physicians who were statutorily entitled to review by the medical mediation panels were arbitrarily denied their right to mediation because of the existence of crowded court dockets and other delays.

The Supreme Court held:

> It simply offends due process to countenance a law which confers a valuable legal right but then permits that right to be capriciously swept away on the wings of luck and happen-stance.
>
> Aldana, 381 So.2d at 236.

Under the reasoning of Aldana, section 768.56 must be declared unconstitutional as applied in this case. The attorney's fee statute, like the mediation panels statute, purports to extend a certain bundle of rights to health care providers. In the case of mediation panels, physicians were extended the right to have a neutral panel make a preliminary decision as to liability as a condition of a plaintiff's filing suit. When the application of another portion of that statute, the non-extendable ten-month time limitation, effectively abolished physicians' rights to mediation, this Court held the scheme violated due process.

On its face, Section 768.56 tells a defendant that if it chooses to assert its defenses throughout a trial and appeal, and losses, it will be liable for reasonable attorney's fees. The statute purportedly gives the defendant the right to avoid that possible sanction by settling the case prior to trial. The preamble to the statute could not be clearer that the purpose of the law is to concentrate litigants' minds on that choice and hold them responsible for it by assessment of attorney's fees.

Because of the enormity of the damages claimed in this case, the statutory settlement constraints imposed by section 768.54(3)(e)3 eliminated that choice for these defendants as a practical matter at the time of trial. The unquestioned applicability of section 768.54 at the time of this

litigation resulted in the imposition of all of the penalties of the attorney's fee statute, even though the defendants were unable to avoid the penalty by settlement as contemplated by section 768.56. Such a capricious and irrational application of the statute violates the defendants' rights to due process of law.

CONCLUSION

For the foregoing reasons, this Court should order a new trial on damages in this matter. This Court should also validate the payout and limitation of liability provisions of the Fund statute, quashing the erroneous contrary reasoning of the Fourth District. Finally, the Court should examine the attorney's fee awarded in this case and either reduce the award in conformity with a reasonable fee analysis or, in the alternative, strike the attorney's fee statute for unconstitutionality.

Respectfully,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that correct copies of Appellants' brief and Volume III of Appendix were mailed to the addressees listed on the attached Service List this 27th day of October, 1983. Copies of Volumes I and II of the Appendix previously furnished to the same addressees, are being filed with the Court.

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